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No. 91-138

IN THE
SUPREME COURT OF THE UNITED STATES

October, 1991, Term

SAEED MAHMOODIAN, M.D., Petitioner,

vs.

UNITED HOSPITAL CENTER, INC. AND
BRUCE C. CARTER, Respondents.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of Appeals
of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Herbert G. Underwood, Esq.*
Irene M. Keeley, Esq.
Matthew J. Mullaney, Esq.
STEPTOE & JOHNSON
P. O. Box 2190
Clarksburg, West Virginia 26302
(304) 624-8000

COUNSEL FOR RESPONDENTS
*Counsel of record

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CITATIONS TO OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 404 S.E.2d 750. A copy of the opinion also appears in the appendix ("A") to the petition for writ of certiorari.

The opinions of the Circuit Court of Harrison County, West Virginia, are not published. A copy of the final order of the circuit court, entered November 30, 1989, appears in the appendix ("B") to the petition for writ of certiorari. A copy of the initial decision of the circuit court, denying petitioner's motion for a preliminary injunction, entered February 1, 1989, is included in the appendix to this brief in opposition to petition for writ of certiorari.

STATEMENT OF THE CASE

By decision dated April 25, 1991, the West Virginia Supreme Court of Appeals (the "state court") sustained the action of United Hospital Center, Inc. ("UHC" or "the hospital"), taken upon the recommendation of its medical staff, to revoke the hospital privileges of Saeed Mahmoodian, M.D. ("Mahmoodian"). The state court's opinion appears in the appendix to the petition for writ of certiorari. The hospital's action was initially reviewed by the Circuit Court of Harrison County (the "trial court") during an evidentiary hearing on Mahmoodian's motion for a preliminary injunction. The trial court denied the motion, finding inter alia, that there was no likelihood of success on the merits. The trial court did grant limited and temporary relief to Mahmoodian for the benefit of patients then under his care.

The trial court's findings, conclusions, and order entered on February 1, 1989 are included in the appendix ("C") to this brief in opposition.

Thereafter, the state court granted without comment Mahmoodian's ex parte motion for a preliminary injunction. At a later date, the trial court sought without success to certify five legal questions for decision, but the state court refused to docket the certified questions, again without comment. On November 30, 1989, without taking any further evidence in the case, and in order to put the case in a posture for a final appeal on the merits, the trial court granted a permanent injunction against the hospital and in favor of Mahmoodian, acting in deference to the unexplained interlocutory actions of the state court. The hospital appealed to the state court which thereafter set aside

the trial court's permanent injunction and, in effect, affirmed the trial court's initial decision to deny Mahmoodian's motion for a preliminary injunction.

Mahmoodian's statement of the case miscasts the facts. He would have this Court believe he is the only physician in the Clarksburg area that treats indigent pregnant women. He would have this Court believe that Mahmoodian's peers found no fault whatsoever with his clinical/surgical abilities. He would have this Court believe he has been the model physician-colleague since the medical staff began its current investigation of his professional conduct. Finally, Mahmoodian would have this Court believe the motive of the medical staff and the hospital was to silence Mahmoodian's attacks upon substandard medical practices. None of these assertions are true. Mahmoodian has

sought to put this same "spin" on his case before his peers, before the board of directors of the hospital, before the Circuit Court of Harrison County during an evidentiary hearing, and before the West Virginia Supreme Court of Appeals, each time without success.

The facts are that Mahmoodian was not the sole source of medical services to indigent women in Harrison County needing obstetrical or gynecological services, and Mahmoodian's services to women at the health department's clinic were not altruistic. He received many of his patients through clinic referrals. The medical staff recommended that Mahmoodian's clinical privilege to perform the Wertheim procedure (a "radical" hysterectomy with removal of the pelvic lymph node chain) be withdrawn due to inexperience and incompetence even if his medical staff

privileges would not be revoked. Mahmoodian did not challenge that recommendation in the later stages of this case. Relations between Mahmoodian and the physicians and nurses of the obstetrical unit of the hospital did not materially change after the medical staff initiated corrective action against Mahmoodian. There were continuing revelations of Mahmoodian's disruptive conduct before the trial court and the state court. Finally, the hospital has denied throughout and denies here any improper motive toward Mahmoodian and relies upon the fact that his assertions of improper motive have been rejected at each stage of this proceeding.

The four other physicians privileged to practice obstetrics and gynecology at UHC did not participate at any stage of the peer review process in the recommendation of the medical staff to the hospital board

to revoke Mahmoodian's privileges. A list of the proceedings before the hospital and its medical staff is included in the appendix ("D") to this brief in opposition. Good cause for an investigation and then a hearing concerning Mahmoodian's professional conduct, and the reasons for revoking his medical staff privileges and withdrawing his clinical privilege to perform the Wertheim procedure, are set out in the report and recommendation of the ad hoc hearing committee of the medical staff, included in the appendix ("E") to this brief in opposition.

WHY A WRIT SHOULD NOT BE GRANTED

1. Each of the issues raised by the petitioner was fully briefed, discussed, and decided by the West Virginia Supreme Court of Appeals. This case is not of a special or important character. There is no conflict among the federal or state courts on the federal due process question raised by the petitioner; federal and state courts uniformly hold that a private hospital is not a state actor when it grants, denies or revokes medical staff privileges, and is not subject to the due process clause of the Fourteenth Amendment. Any conflict among the states concerns only the applicability of and compliance with a hospital's medical staff bylaws and the scope of judicial review of the hospital's decision, and arises from disparate interpretations of each state's common law, contract law, or public policy.

2. To the degree that public policy would be advanced by uniform peer review procedures for public and private hospitals alike, that public policy is being advanced by the United States Congress, and there is no need for this Court to act. Moreover, this would not be a proper case for the Court to act upon. The state court here did not rely upon the public hospital-private hospital dichotomy to guide its judicial review of the decision of the hospital and its medical staff to revoke the petitioner's medical staff privileges.

3. The remaining issues raised by the petitioner, to wit: the extent of cross-examination provided and the adequacy of the standard of proscribed conduct under the medical staff bylaws, were carefully considered by the state court. These present no legal issue of general applicability and do not merit the attention of this Court.

ARGUMENT

1.

United Hospital Center, Inc. ("UHC" or "the hospital") and Bruce Carter, respondents, oppose the petition for writ of certiorari of Saeed Mahmoodian, M.D.("Mahmoodian"). The petition falls outside the considerations governing review on writ of certiorari and raises no special or important issue sufficient in character to call forth this Court's jurisdiction. Mahmoodian is in error when he asserts that "case law and sound public policy demand" that this Court "abandon the private hospital-public hospital dichotomy and apply the due process protection of the Fourteenth Amendment to actions of hospitals in terminating, revoking or refusing medical staff privileges to a physician." (p. 13). The case law is not in conflict and public policy is being advanced by the United States Congress.

The West Virginia Supreme Court of Appeals (the "state court") refused to be drawn into a private hospital-public hospital debate. Instead, the state court based its judicial review upon an existing professional relationship between UHC and Mahmoodian. The state court reasoned:

> an extensive discussion of this public hospital/private hospital dichotomy distracts attention from more significant issues in this case. The limited record before us on the point supports the factual finding of the Circuit Court of Harrison County that UHC is a private hospital for purposes of personnel decisions. Our analysis will, therefore, be based upon UHC's private status.
>
> We do note that the scope of judicial review of health care peer review decisions adversely affecting the privileges of a medical staff member is essentially the same for private and public hospitals. While such decisions of public hospitals must be reached after affording "due process," and such decisions of private hospitals must be reached after affording "fair procedures," recent federal legislation would encourage essentially all

> hospitals to use the same procedures. See infra note 10 (discussing the Federal Health Care Quality Improvement Act of 1986, 82 U.S.C. §§ 11101-11152). (Emphasis in original). Note 2, A-52. [All references to the decision below will be to petitioner's Appendix A].

Concerning the scope of judicial review, the state court held:

> Utilizing breach of contract principles, most courts explicitly addressing the issue presented here have held, and we hereby hold, that the decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to insure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to insure that the medical staff bylaws afford basic notice and fair hearing procedures, including an impartial tribunal. (A-16).

Thereby, the West Virginia court joined a growing chorus of state courts that have granted limited judicial review of a private hospital's medical staff

decisions. Medical staff bylaws are the most common basis upon which most courts now undertake judicial review.[1] Some courts have undertaken judicial review based upon the public interest in the hospital's decision, the so-called "New Jersey rule" stated in Greisman v. Newcomb Hospital, 192 A.2d 817 (N.J. 1963).[2] California courts

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[1] Courtney v. Shore Memorial Hospital, 584 A.2d 817 (N.J. Super. 1990); Wong v. Garden Park Community Hospital, 565 So.2d 550 (Miss. 1990); Adkins v. Sarah Bush Lincoln Center, 544 S.E.2d 733 (Ill. 1989); Friedman v. Memorial Hospital of Southbend, Inc., 523 N.E.2d 252 (Ind. App. 1988); Pepple v. Parkview Memorial Hospital, 511 N.E.2d 467 (Ind. App. 1985); Yarnell v. Sisters of St Francis Health Sisters, 446 N.E.2d 359 (Ind. 1983); Even v. Longmont Hospital Association, 629 P.2d 1100 (Colo. 1981); Huffaker v. Baily, 540 P.2d 1398 (Or. 1975); Bricker v. Sceva Speare Memorial Hospital, 281 A.2d 589 (N.H. 1971); Blende v. Maricopa County Medical Society, 393 P.2d 926 (Ariz. 1964); Levin v. Sinai Hospital of Baltimore City, Inc., 46 A.2d 298 (Md. 1946).

[2] The progeny of Greisman v. Newcomb Hospital include Nanavati v. Burdette Tomlin Memorial Hosp., 526 A.2d 697 (N.J. 1987); Kelly v. St. Vincent Hospital, 692 P.2d 1350 (N.M. App. 1984); Storrs v. Lutheran Hospitals and Homes Society of America, Inc., 609 P.2d 24 (Alaska 1980); Hawkins v. Kinsie, 540 P.2d 345 (Colo. App. 1975); Silver v. Castle Memorial Hospital, 497 P.2d 564 (Haw. 1972); Davidson v. Youngstown Hospital Assn., 250 N.E.2d

have undertaken judicial review based upon the state's common law and fairness[3] or upon a specific provision of the California Code of Civil Procedure.[4] An Alaska court held that medical staff bylaws constitute a contract between the physician and the hospital and granted judicial review.[5]

Some states have denied any judicial review of medical staff decisions of private hospitals[6], but the West Virginia

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892 (Ohio App. 1969); Woodward v Porter Hospital, Inc., 217 A.2d 37 (Vt. 1966).

[3] Sywak v. O'Conner Hospital, 199 Cal. App.3d 423, 244 Cal. Rptr. 753 (1988); Miller v. National Medical Hospital of Monterey Park, Inc., 124 Cal. App.3d 81, 177 Cal. Rptr. 119 (1981); Pinsker v. Pacific Coast Society of Orthodontists, 12 Cal.3d 541, 116 Cal.Rptr. 245, 526 P.2d 253 (1974).

[4] Anton v. San Antonio Community Hospital, 567 P.2d 1162 (Cal. 1977).

[5] McMillan v. Anchorage Community Hospital, 646 P.2d 857 (Alaska 1982)

[6] Sarin v. Samaritan Health Center, 440 N.W.2d 80 (Mich. App. 1989); Barrows v. Northwestern Memorial Hospital, 525 N.E.2d 50 (Ill. 1988); Medical Center Hospital v. Terzis, 367 S.E.2d 728 (Va. 1988); Hottentot v. Mid-Maine Medical Center, 549 A.2d 365 (Me. 1988); Brandt v. St. Vincent

state court rejected that line of cases when the termination of a preexisting physician-hospital relationship is involved.

This Court correctly observed that state courts typically limit their review of medical peer review decisions to be assured that a reasonable procedure was followed and that there was evidence to support a finding that patient care was at risk. Patrick v. Burget, 486 U.S. 94, 104-05, 108 S.Ct. 1658, 1665, 100 L.Ed.2d 83, 94 (1988). This unanimous Court was not at all concerned that Oregon law would likely limit judicial review to whether or not reasonable procedures had been followed and would not address the merits of the underlying peer review decision. Id. The

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Infirmary, 701 S.W.2d 103 (Ark. 1985); Velduis v. Central Michigan Community Hospitals, 369 N.W.2d 478 (Mich. 1985).

decision of the West Virginia court exceeds the anticipated scope of judicial review of the Oregon court forecast by this Court.

United Hospital Center is described by the state court as a

> private, not for profit hospital incorporated under the laws of the State of West Virginia. It was created voluntarily by private individuals. It is operated by an elected board of directors. It is not owned or operated by any governmental entity. (A-6).

UHC is a "pure" private hospital, without any contractual, financial or statutory ties whatsoever to a state or local governmental agency. State involvement without state responsibility cannot establish "a sufficiently close nexus between the State and the challenged action of the regulated entity that the action of the latter may fairly be treated as that of the state itself." Jackson v. Metropolitan Edison, 419 U.S. 345, 95 S.Ct. 449,42 L.Ed.2d 477 (1974). See also Flagg

Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). If UHC is a "state actor" then every single hospital in the United States must comply with the due process clause of the Fourteenth Amendment when taking action adverse to a present or perspective member of its medical staff. Such a decision would be a radical and unnecessary change in the law, with ramifications beyond medical peer review decisions.

The dichotomy between private action and state action and the due process clause of the Fourteenth Amendment is well established in health care law. Relying on Jackson v. Metropolitan Edison, the Court of Appeals for the Fourth Circuit, which includes West Virginia, has held that the existence of state statutes governing myriad aspects of hospital operations, the receipt of Hill-Burton funds, and participation in the Medicare and Medicaid

programs, do not transmute a private hospital into a state actor. Modaber v. Culpepper Memorial Hospital, Inc., 674 F.2d 1023 (4th Cir. 1982).

Other federal courts that have considered the question have held likewise. See Mendez v. Belton, 739 F.2d 15 (1st Circ. 1984); Lubin v. Crittenden Hospital Association, 713 F.2d 414 (8th Cir. 1983); Lipsett v. University of Puerto Rico, 637 F.Supp. 789 (D. Puerto Rico 1986) and Robbins v. Ong., 452 F.Supp. 110 (S.D.Ga. 1978); Shulman v. Washington Hospital Center, 222 F.Supp. 59 (D.D.C. 1963).

There is no conflict whatsoever among the state courts on this federal due process issue, and there is no reason for the Court to visit the issue. Mahmoodian's reliance upon Greisman v. Newcomb Hospital, 192 A.2d 817 (N.J. 1963), is misplaced. The New Jersey court did not declare Newcomb Hospital to be a state actor, and

judicial review was not undertaken on constitutional due process grounds. Judicial review was bottomed on the public interest in a community hospital's policy that appeared to keep a fully licensed and qualified osteopathic physician from seeking hospital privileges and competing with allopathic physicians that populated medical societies and hospital medical staffs in New Jersey. The decision was a narrow one. Only the validity of the medical staff's bylaws that conditioned hospital staff privileges on membership in the medical society was at issue. 192 A.2d at 824. A recent New Jersey decision treats of Greisman and the present standard of judicial review.

> In reaching that conclusion [i.e., in Greisman], we also declared that "reasonable and constructive exercises of judgment should be honored. . ." Id. Just last year, we further relaxed the test for judicial review and stated that courts should not interfere with a

> hospital decision setting a standard for admission "if it is reached in the normal and regular course of conducting the affairs of the hospital and is based on adequate information, regardless of form, origin, or authorship, that is generally considered feasible and reliable by professional persons responsibly involved in the health care field." Desai v. St. Barnabas Medical Center, [103 N.J. 79, 93, 510 A.2d 662 (1986)].

Nanavati v. Burdette Tomlin Memorial Hospital, 526 A.2d 697, 701 (N.J. 1987).

The judicial review standard applied by the West Virginia court here is like the judicial standard applied by a New Jersey court that sustained a private hospital's action against a disruptive physician. Courtney v. Shore Memorial Hospital, 584 A.2d 817 (N.J. Super. 1990). Relying on Nanavati v. Burdette Tomlin Memorial Hospital, supra, the New Jersey court said:

> When the decision relates to subjective matters such as disruptive conduct, a termination of hospital privileges requires a finding

> that prospective disharmony will probably have an adverse effect on patient care. . . . In all events, the courts are enjoined to recognize the expertise of the board and the extensive external regulation to which it is subjected.

Id. at 818.

It is not enough for Mahmoodian to cite to this Court cases where state courts "have shown a willingness to review actions of private hospitals on the ground that private hospitals are sufficiently involved with public interest to warrant judicial intervention." (p. 15). The West Virginia court did undertake judicial review of the decision of UHC. Yet, this is the best Mahmoodian can do. He is unable to direct this Court to any authoritative state or federal decision that would support application of the due process clause of the Fourteenth Amendment to the decision of the UHC board of directors to follow the recommendation of its medical staff and

revoke the medical staff privileges of Mahmoodian. See supra notes 1 to 6.

This case represents no more than the garden variety medical privilege/discipline issue now commonplace in this country as hospitals respond to federal and state legislation supporting medical peer review,[7] and to a high tide of medical malpractice suits carrying a corporate negligence count against a hospital for failure to police its medical staff privileges.

2.

The Court need not intervene here in reply to Mahmoodian's public policy plea because the Congress of the United States

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[7] By 1985, forty-five (45) states had adopted legislation establishing some form of qualified privilege to protect medical peer review work from disclosure in order to encourage effective medical peer review. Daily Gazette Co. v. West Virginia Board of Medicine, 352 S.E.2d 66 (W.Va. 1986). By 1986, Congress enacted the Federal Health Care Quality Improvement Act (42 U.S.C. §§ 11101-11152) to encourage good faith medical peer review to identify incompetent or unprofessional practitioners.

has acted to introduce uniform hearing procedures and standards into medical peer review matters in both private and public hospitals. The Federal Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §§ 11101-11152, was enacted to deter litigation arising out of the grant or denial of hospital medical staff privileges. Congress expressly found that "[t]here is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." 42 U.S.C. 11101(5).

The Act creates a National Data Bank to record medical malpractice judgments and settlements as well as adverse peer review decisions. Hospitals and their medical staff members that request Data Bank records on physicians holding or seeking medical staff privileges and that meet certain procedures and standards for peer

review action are qualifiedly immune from suit for money damages under state or federal law. 42 U.S.C. 11111(a). The specific standards and procedures for peer review action are reprinted in the appendix ("F") to this brief in opposition. The Act is not intended to change any federal or state law concerning the judicial standard of review of peer review activities [42 U.S.C. 11115(a)], but the Act will produce uniform peer review procedures among public and private hospitals to secure the qualified immunity.

3.

Whether Mahmoodian had adequate opportunity to cross-examine witnesses was fully briefed and argued on appeal and addressed by the state court, which held:

> The procedure in question was reasonable for peer review. . . . The procedure here certainly complied with the medical staff bylaws, which authorized an evidentiary hearing without strict adherence to evidentiary

> rules applicable to civil or criminal trials in courts of law. . . . Also, each of the procedural rights afforded Dr. Mahmoodian would satisfy the hearing standards established by the Federal Health Care Quality Improvement Act of 1986. . . . (Citations and footnotes omitted). (A-26 to 27).

The trial court, after a three-day evidentiary hearing on Mahmoodian's motion for a preliminary injunction, made a like factual finding (Appendix C, Finding No. 3) and concluded that "The actions of UHC were in accord with the procedures provided under the Bylaws of the Medical Staff and were not exercised in an arbitrary and capricious manner." (Appendix C, Conclusion No. 3).

Whether or not Mahmoodian was denied an adequate opportunity to cross-examine witnesses is not a transcendent issue to call forth this Court's discretionary review. A writ of certiorari is not for the purpose of second guessing the

considered judgment of the highest court of a state on such a case-specific issue. Review of this issue would have no effect whatsoever on the larger body of law that applies to medical peer review.

Below as here, Mahmoodian challenged the motive of the medical staff for acting against him. The state court, which adopted a "substantial evidence" standard over a less invasive/inquiring "arbitrary and capricious (or abuse of discretion)" standard (A-45), found in the record "substantial evidence supporting (the hospital's) decision." (A-50). The state court specifically referred to three "of the more egregious incidents" (the court's own words) supporting the decision; the state court also noted "The record is replete with other evidence supporting the hospital's decision to revoke Dr. Mahmoodian's staff appointment privileges." (A-46 to 50).

Mahmoodian's assertion that UHC's medical staff bylaws failed to provide a sufficiently definite standard to which he might conform his conduct is without factual or legal merit. UHC's medical staff bylaws require that members of the medical staff "adhere to the ethics of their profession" and demonstrate "an ability to work with others" so that "any patient treated (by the physician in question) will be given a high quality of medical care." (Medical Staff Bylaws 3.02). Corrective action against a member of the medical staff is undertaken "whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be . . . disruptive to the operations of the hospital." (Medical Staff Bylaws 7.01). The American College of Obstetricians and Gynecologists (ACOG), of which Mahmoodian is a fellow, charges its members with

adherence "to the social and ethical principles of honesty, loyalty, courtesy, and respect for the rights of others - above all honesty. . . . No Fellow should use opportunities arising out of contact with patients, colleagues, or the general public for self-aggrandizement or for demeaning the reputation of a colleague." Ethical Considerations in the Practice of Obstetrics and Gynecology (7th ed.).

Mahmoodian was no stranger to the conduct requirements of the medical staff bylaws, which were fleshed out for him in repeated corrective actions in the 1970's, including a one-year reduction in 1977 from active medical staff to provisional medical status for conduct like the conduct that again subjected him to medical staff scrutiny in 1987 and 1988.

The standard of "unprofessional conduct" in medical staff bylaws is sufficiently objective to guard against

arbitrary and unreasonable application. Nanavati v. Burdette Tomlin Memorial Hospital, supra. Application of an "unprofessional conduct" standard encompasses disruptive personal and professional relationships with other hospital personnel. Even v. Longmont Hospital Association, 629 P.2d 1100 (Colo. 1981). In accord, McMillan v. Anchorage Community Hospital, 646 P.2d 857 (Alaska 1982). It is for a hospital to decide whether personality differences are detrimental to the efficient operation of the hospital. Robbins v. Ong, 452 F.Supp. 110 (S.D.Ga. 1978). A failure of good moral character may also subject a physician to censure; good medical care alone is not sufficient to justify licensure and the highest degree of personal integrity may be expected. Alsabti v. Board of Registration of Medicine, 536 N.E.2d 357 (Mass. 1989). See

also Hirsh, The "Disruptive" or "Bad" Physician in the Hospital, 35 Medical Trial Technique Quarterly 304, Calaghan & Co. 1989; Springer and Casale, Hospitals and the Disruptive Health Care Practitioner - Is the Inability to Work with Others Enough to Warrant Exclusion?, 24 Duquesne Law Review 377, 383-384 (1985).

The state court concluded:

> Accordingly, we believe sections 7.01 and 3.02 of the medical staff bylaws in this case set forth a reasonably definite standard of professional conduct for purposes of basic notice to medical staff members as to what behavior is and is not expected of them. Moreover, in this particular case, given Dr. Mahmoodian's history as far back as 1974 of seven other "corrective actions" by the medical staff for similarly disruptive behavior, his assertion that he did not know what constituted such behavior is implausible. (A-31 and 32).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the

West Virginia Supreme Court of Appeals should be denied.

Respectfully submitted this 16th day of August, 1991.

Herbert G. Underwood, Esq.
Irene M. Keeley, Esq.
Matthew J. Mullaney, Esq.
STEPTOE & JOHNSON
P.O. Box 2190
Clarksburg, WV 26302
(304) 624-8000

Counsel for Respondents

APPENDIX*

C. Order, findings of fact, and conclusions of law of the trial court on Mahmoodian's motion for a preliminary injunction, entered February 1, 1989

D. Chronology and description of events before United Hospital Center and its medical staff concerning the privileges of Dr. Mahmoodian

E. Report and Recommendation of the Hearing Committee

F. Health Care Quality Improvement Act, Standards for Professional Review Actions

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* Respondents begin lettering this appendix with "C" to take account of petitioner's appendix, which contains items "A" and "B".

IN THE CIRCUIT COURT
OF HARRISON COUNTY, WEST VIRGINIA

SAEED MAHMOODIAN, M.D.,

Plaintiff,

v. // Civil Action No.. 89-C-25-1

UNITED HOSPITAL CENTER, INC.,
BRUCE C. CARTER, ALI RAHIMIAN,, M.D.
and FLORENCIA C. LOPEZ, M.D.

Defendants.

O R D E R

On the 27th day of January, 1989, came the plaintiff, Saeed Mahmoodian, M.D. by his attorney, Jerald E. Jones, and came the defendants United Hospital Center, Inc. ("UHC") and Bruce C. Carter by two of their attorneys, Herbert G. Underwood and Gordon H. Copland, pursuant to the request of the plaintiff for injunctive relief.

Now pending before the Court is the motion of the plaintiff for a preliminary

injunction whereby the plaintiff seeks an injunction requiring the defendant, United Hospital Center, Inc., to continue the plaintiff's active staff privileges during the pendency of this civil action.

The original complaint sought a complete restoration of plaintiff's privileges as a medical staff appointee at UHC, including the restoration of the privilege to do Wertheim ("radical") hysterectomies. The plaintiff now seeks only a return of all such privileges other than the privilege to perform Wertheim ("radical") hysterectomies.

In addition to preliminary and permanent equitable relief, the plaintiff, by his verified complaint, seeks compensatory and punitive damages from UHC and the other defendants.

The Court has heard three days of testimony and now has before it the

exhibits introduced at the hearing and filed by the parties with their pleadings, motions, and briefs. Upon consideration of the testimony, the entire record, and the arguments and briefs of counsel the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. UHC is a private not-for-profit hospital under the laws of the state of West Virginia which is operated by an elected Board of Directors and is not owned or operated by any governmental entity and is the only hospital in Harrison County, West Virginia, which provides all phases of hospital care for the general public and the only hospital in said county available for the hospitalization and treatment of obstetrical and gynecological patients.

2. The plaintiff, Saeed Mahmoodian, is a physician, licensed to practice

medicine in the State of West Virginia; he is board certified in obstetrics and gynecology; he has been afforded staff privileges in obstetrics and gynecology at United Hospital Center, Inc. or its predecessor corporation, for approximately eighteen years; he is not licensed to practice medicine in any state other than West Virginia; he does not have staff privileges at any hospital other than United Hospital Center, Inc. and from that time his practice at UHC has been subject to the Bylaws of the Medical Staff.

3. On or about February 8, 1988, UHC began against the plaintiff the "corrective action" process, at issue here, as provided for in the UHC Medical Staff Bylaws. Dr. Mahmoodian was notified of the formation of an investigative committee and at all subsequent stages of the process was informed of the procedures and the nature

and extent of his right to participate. Dr. Mahmoodian was represented by counsel during the process. By counsel, Dr. Mahmoodian objected at various points to the procedures. The Court finds, however, that the procedural provisions of the Bylaws were substantially followed, including the Ad Hoc Review Committee allowing the members of the Ad Hoc Investigative Committee to submit hearsay testimony and to summarize evidence obtained by that committee. The adequacy of the Bylaws provisions is addressed in the Conclusions of Law.

4. The members of the Medical Staff Ad Hoc Investigative Committee, none of whom were competitors of the plaintiff, recommended termination of the plaintiff's privileges. The Executive Committee of the Medical Staff adopted the recommendation. The plaintiff exercised his right, by

counsel, according to the Medical Staff Bylaws, to a hearing before an Ad Hoc Review Committee appointed to review the charges and hear the evidence. The members of the Ad Hoc Review Committee were not competitors of the plaintiff and had not participated in the investigative process. The Ad Hoc Review Committee convened on May 4, 1988 and continued its hearing on three additional occasions. During the hearing, over the objection of plaintiff, there were occasions that the Committee received hearsay and opinion evidence in support of the recommendation of the Medical Executive Committee. Plaintiff also submitted hearsay evidence to rebut the recommendation of the Medical Executive Committee. At the conclusion of its deliberations, the Ad Hoc Review Committee issued a written decision which upheld the recommendation to terminate the plaintiff's

privileges. Subsequently, at a special meeting of the Medical Staff on October 18, 1988, by a vote of 32-17, the Medical Staff voted to recommend termination of the plaintiff's medical staff privileges. Thereafter, the plaintiff exercised his right, by counsel, to an appellate review before the UHC Board of Directors. Together with his attorney, he met with the Appellate Review Committee, on December 8, 1988. On December 27, 1988, the Appellate Review Committee of the Board of Directors voted to terminate the plaintiff's staff privileges effective January 31, 1989. Pursuant to the Medical Staff Bylaws, plaintiff was notified of the decision by defendant Carter on December 28, 1988.

5. The basis for the termination was that the plaintiff had engaged in a pattern of behavior which was unprofessional, disruptive of the proper functioning of the

obstetrical/gynecological ("OB/GYN") unit of the hospital and violative of the standards set forth in the Medical Staff Bylaws. For reasons set forth in the Conclusions of Law, the Court is not empowered to make a de novo determination of these issues.

6. The Bylaws of the Medical Staff at UHC do not condition "corrective action" for physicians holding staff privileges on patient harm or the likelihood of patient harm and there was no evidence that the plaintiff was not qualified to practice obstetrics and gynecology, or that his presence on the staff had actually harmed a specific patient.

7. UHC receives payments for patient care from various governmental sources, including the Medicare and Medicaid programs. The plaintiff has not shown any nexus between the decision of UHC to

terminate the privileges of the plaintiff and those payments or any branch of government.

8. The termination of plaintiff's staff privileges at United Hospital Center, Inc. substantially affects and curtails his ability to practice obstetrics and gynecology as hospital privileges are of paramount importance in that medical specialty and his inability to use United Hospital Center facilities will have a significant impact upon his practice and upon his income. The plaintiff has not applied for staff privileges at other hospitals in the locality surrounding Harrison County and did not demonstrate that he is unable to obtain clinical privileges at those hospitals. Nor did he refute that there are physicians available on the Medical Staff of UHC to provide

OB/GYN services to the class of patients served by the plaintiff.

9. The plaintiff, in addition to his private practice, is the only physician who presently attends indigent female patients at the Harrison County Health Department Pre-Natal Clinic and Family Planning Clinic. The patients of the Pre-Natal Clinic consist of thirty to forty pregnant females who will need hospital facilities for child birth.

10. Certain of the current obstetrical patients of the plaintiff present special risks in regard to their delivery or their health generally. Precluding care of them by Dr. Mahmoodian and requiring their transfer to other physicians would not serve their best interests or provide the safest mode of treatment. The latter conclusion also is applicable to any GYN patients of the

plaintiff as of January 31, 1989, who may require gynecological surgery in the near future.

11. In conformity with the provisions of the Bylaws which provide for such, except in cases of summary suspension, the plaintiff has continued to practice at United Hospital Center during the course of the disciplinary proceedings against him.

Conclusions of Law

1. The Court concludes that in ruling on a preliminary injunction request, it must balance the equities of the case and, in doing so, must consider the following:

(1) The probability of irreparable harm to the plaintiff if the injunction is denied;

(2) The probability of harm to the defendant if the injunction is granted;

(3) The likelihood of success on the merits;

(4) The public interest.

2. The burden is on the plaintiff to establish his entitlement to a preliminary injunction.

3. The restrictions of the Constitutions of the United States and West Virginia apply only with respect to governmental action. The action of an otherwise private entity can become "state action" for the purposes of the constitutional restrictions only if there is a sufficient nexus between the challenged act and the government.

4. There is no sufficient nexus between the termination of the privileges of the plaintiff and a governmental entity to require this Court to conclude that the hospital's actions constitute state action; therefore, the action terminating the

plaintiff's privileges was not governed by the restrictions of the Constitutions of West Virginia or of the United States.

5. The only procedural protections to which the plaintiff was entitled were those found in the Bylaws of the UHC Medical Staff.

6. The actions of UHC were in accord with the procedures provided under the Bylaws of the Medical Staff and were not exercised in an arbitrary and capricious manner.

7. Although the Court finds that UHC is a private hospital, it nevertheless concludes that UHC is required to comply with its own Bylaws and the due process provisions contained therein, in terminating the privileges of a staff appointee.

8. The Court further concludes that a court may not substitute its judgment for

that of the medical staff and the Board of Directors of a private hospital in matters regarding medical staff privileges. The Court, however, holds that it may overturn such a decision if the decision is arbitrary and capricious.

9. The plaintiff has not shown that denial of the request for a preliminary injunction will cause him irreparable harm.

10. The plaintiff has not shown any likelihood of success on the merits of his claim for injunctive relief against UHC; furthermore, the Court holds that the plaintiff's claim against UHC as presented in this hearing will probably fail on the merits for injunctive relief. There is no indication that the plaintiff can prevail on his claim for permanent injunctive relief against UHC because UHC is not a public hospital; nor is it likely that the plaintiff can show that the termination

decision of the hospital was arbitrary and capricious.

11. The public interest in the overall quality of patient care at UHC and the efficient operation of the hospital must be balanced with the interest of specific patients of Dr. Mahmoodian in continuity of care. This latter interest may be served by the granting of a temporary and limited injunction.

Order

In weighing all of the foregoing, the Court does hereby ORDER that the plaintiff's Motion is DENIED conditioned upon the requirement that the defendant shall grant temporary and limited privileges to the plaintiff for a period of 90 days from January 31, 1989 or until such time as all of the patients as of January 31, 1989 of the plaintiff presently in their third trimester of pregnancy are

delivered. The privileges shall be limited in scope and extent as described below:

1. The scope of clinical practice allowed under the temporary privileges shall be that possessed by the plaintiff prior to the initiation of corrective action by UHC; provided, however, that the hospital is not required to grant privileges to the plaintiff to perform Wertheim (radical) hysterectomies; and,

2. The privileges shall apply to persons who are OB/GYN patients of the plaintiff as of January 31, 1989 who also meet the following conditions:

   a. OB patients in the third trimester of their pregnancy; or,

   b. GYN patients who are in need of surgical treatment.

The plaintiff is to provide within the next ten (10) days a list of his obstetrical patients who, as of January 31, 1989, are in their third trimester of pregnancy.

The parties hereto object and except to the extent their respective interests are affected thereby.

By agreement of the parties, the injunction bond required by W.Va. Code §53-5-9 is hereby waived for the duration of this Order.

The Clerk is directed to send a certified copy of this Order to counsel of record.

ENTER: _____

_____
Judge

Chronology and Description of Events Before UHC and Its Medical Staff

A. Medical Staff Executive Committee-Ad Hoc Investigative Committee

Feb. 8, 1988 -

The Executive Committee of the Medical Staff received a request for corrective action from Bruce Carter, Administrator of United Hospital Center, Inc., regarding plaintiff's care and treatment of patients, particularly Geneva Boram, and complaints that plaintiff had engaged in unprofessional conduct and a practice of harassment of employees and physicians at United Hospital Center.

Feb. 11, 1988 -

Dr. Bryant, President of the Medical Staff, notified Plaintiff that, in accordance with the Bylaws of the Medical Staff of United Hospital Center, he had appointed an ad hoc investigative committee to review the request for corrective action and that plaintiff would be contacted in order to confirm a time on February 12, 1988 for his interview with the committee.

Feb. 12, 1988 -

By letter from counsel, plaintiff notified the chairman of the ad hoc investigatory committee that he

would not participate in the committee's proceedings.

Feb. 16, 1988 -

By counsel, the Committee advised plaintiff in writing that such interviews by the medical staff are not accusatory and have permitted physicians involved in such investigations to discuss complaints prior to any definitive action being taken, but that if plaintiff declined to discuss the matters raised in the complaints with the Committee, it would submit its recommendation to the Executive Committee of the Medical Staff without the benefit of his input. The letter also noted that Dr. Mahmoodian had participated in a similar investigative interview the previous year during an earlier peer review proceeding.

Feb. 23, 1988 -

By counsel, plaintiff reiterated his position that he should not "be hauled in before a Committee."

Mar. 1, 1988 -

Counsel for the medical staff committee again advised plaintiff's counsel that the request for an intraprofessional investigative interview was not accusatory but was for the purpose of extending to the plaintiff the opportunity to appear at the Committee's meeting.

Mar. 3, 1988 -

Dr. Mahmoodian, with his attorney, met with the investigative committee, which also had an attorney present, to explore the medical staff's concerns.

Mar. 18, 1988 -

The ad hoc investigative committee, after 22 hours of interviews and deliberations over the course of several meetings, filed a written report of its findings and recommendations with the Medical Executive Committee.

B. Medical Staff Executive Committee-Ad Hoc Review Committee

Mar. 22, 1988 -

Plaintiff was notified that, in accordance with the Bylaws of the Medical Staff of United Hospital Center, the Executive Committee, at its regular monthly meeting on Monday, March 21, 1988, had reviewed the recommendation of the ad hoc investigative committee and had voted to recommend the ad hoc committee's recommendation to the Board of Directors. Pursuant to Article VIII of the Medical Staff Bylaws, plaintiff was further notified of his right to a hearing before an ad hoc hearing (review) committee of the medical staff

before any recommendation was forwarded to the Board.

Mar. 30, 1988 -

Plaintiff requested a hearing and the right to be represented by an attorney at the hearing.

Apr. 7, 1988 -

After agreement among the parties regarding scheduling, plaintiff was notified that the requested hearing was scheduled for Wednesday, May 4, 1988 and of the procedure to be there followed in accordance with Article VIII of the Medical Staff Bylaws.

May 4, 1988 -

The ad hoc hearing committee of the Medical Staff convened with Charles Johnson, a local attorney at law, presiding as hearing examiner. The committee members were William Walker, M.D., Seetha Ginjupalli, M.D. and Paul Braeger, M.D. None of these physicians was associated with or in competition with plaintiff and none had any previous knowledge of the complaint under review.

May-Aug, 1988 -

The ad hoc hearing committee met on five occasions to determine if the recommendation of the Medical Executive Committee was fair and reasonable. Plaintiff appeared in

person and by counsel and participated fully in the hearing.

At the conclusion of the hearing, by agreement of all the parties, written memoranda were submitted by the Executive Committee and Dr. Mahmoodian.

Sept.14, 1988 -

Plaintiff was sent the written Report and Recommendation of the Hearing Committee and notified of his right to request an appellate review by the Governing Board in the event that the Executive Committee made an adverse recommendation.

Thereafter, before any appellate review occurred, the suggested procedure was corrected and plaintiff was notified of his right to a full hearing before the full medical staff prior to submission of any recommendation of the Medical Executive Committee to the Board of Directors, all as provided by the applicable Medical Staff Bylaws.

C. Special Medical Staff Meeting

Oct. 18, 1988 -

Pursuant to notice given on October 4, 1988, a special meeting of the full medical staff was held to review the action of the Ad Hoc Review Committee. At that meeting, plaintiff provided both a written and oral presentation of his case.

By a vote of 32-17, the medical staff voted to recommend termination of his medical staff privileges. By a vote of 40-6, it also voted to suspend his privileges to perform Wertheim (radical) hysterectomies. No competitor of the plaintiff voted on the issues.

D. Board of Directors, Appellate Review Committee

Dec. 8, 1988 -

Plaintiff, accompanied by counsel, met with the appellate review committee of the Board of Directors. Prior to that plaintiff and his counsel had reviewed the membership of that committee and objected to several individuals, who were then removed from the Committee's deliberations.

Dec. 28, 1988 -

Plaintiff was notified of the action and decision of the appellate review committee of the Board of Directors.

UNITED HOSPITAL CENTER, INC.

In the matter of:
Saeed Mahmoodian, M.D.

REPORT AND RECOMMENDATION
OF HEARING COMMITTEE

On February 8, 1988, the Executive Committee of the Medical Staff of United Hospital Center appointed an Ad Hoc Committee to investigate various matters pertaining to the staff privileges of Saeed Mahmoodian. By letter dated February 1, 1988, Dr. Mahmoodian was notified that a committee consisting of Doctors Franklin Oliverio, Samuel Guy, Charles Lefebure and James Bland had been appointed.

The Ad Hoc Committee of the Medical Staff met four times and conducted interviews with physicians, hospital employees and former patients and reviewed documentation and hospital records concerning Dr. Mahmoodian. At the

conclusion of those hearings, the Committee unanimously recommended that the privileges of Dr. Mahmoodian to perform Wertheim hysterectomies with pelvic lymphadenectomies be suspended pending further review through the Credentials Committee, and that the staff privileges of Dr. Mahmoodian at United Hospital Center be terminated because his behavior endangered the quality of patient care and the existence of the obstetrics/gynecological service at United Hospital Center.

The Executive Committee adopted the recommendations of its Ad Hoc Committee, and pursuant to the bylaws of the Medical Staff, Dr. Mahmoodian was notified of this decision, which decision was adverse to him, and he exercised his right to have a hearing before a Committee appointed by the Medical Staff. The President of the Medical Staff appointed a Committee

consisting of Doctors William N. Walker, Seetha Ginjupalli and Paul Brager, and by agreement of all the parties, the Executive Committee and Dr. Mahmoodian were permitted to be represented by counsel at any hearing before such Committee.

The Hearing Committee convened its hearing on May 4, 1988, and continued this hearing on four additional occasions. At the conclusion of the hearing, by agreement of all the parties, memoranda were submitted by the Executive Committee and Dr. Mahmoodian.

The Committee agrees with the recommendation of the Investigative Committee concerning performance of Wertheim hysterectomies with pelvic lymphadenectomies. Based on the evidence before the Committee, there has been a substantial question raised not only about the method by which this procedure

presently is being performed at UHC but also about whether such surgery should be performed at this community hospital. The Executive Committee presented evidence supporting its recommendation, and Dr. Mahmoodian failed to demonstrate that such recommendation involved no factual basis, or that the basis was arbitrary, unreasonable or capricious.

Regarding the recommendation that the staff privileges of Dr. Mahmoodian be terminated, the bylaws of United Hospital Center, particularly Article VII, Section 7.01 provide that if the activities or professional conduct of any practitioner are considered lower than the standards or aims of the Medical Staff, or to be disruptive of the operations of the Hospital, corrective action may be taken. In the matter now before the Committee, the corrective action which was recommended by

the Investigative Committee was termination of the staff privileges of Dr. Mahmoodian.

The evidence presented to this Committee by the Investigative Committee demonstrated that the conduct of Dr. Mahmoodian fell within that conduct described in the above section. The Committee finds that there is an ongoing dispute between Doctors Mahmoodian and Rahimian and Dr. Mahmoodian and the nurses in the obstetrical department. The weight of the evidence supports the conclusion that Dr. Mahmoodian has instigated the turmoil and hostility which exists in that department.

A member of the Investigative Committee testified that there is a general fear of Dr. Mahmoodian among the medical and nursing staff of the Hospital's obstetrical department. Dr. Mahmoodian acknowledged that he considers at least two

of his fellow physicians as enemies and does not speak to several of the nurses with whom he has had disagreements.

Concerning the issue of whether any specific harm to patients has actually occurred, one of the members of the Investigative Committee testified that although he was not aware of any specific harm to patients as a result of the behavior of Dr. Mahmoodian, he felt that the potential existed that such behavior would adversely affect patient care.

In one instance, being that of Noreen Pursley, the transcript of her testimony before the Investigative Committee did indicate that patient care was being compromised as a result of the feud between Dr. Mahmoodian and Dr. Rahimian. In addition, the attempted interruption of a surgery by Dr. Mahmoodian as described by one nurse could potentially have resulted

in adverse consequences for the patient. Testimony concerning Virginia Edgell likewise demonstrated that patient care could have been compromised. The Committee believes that these examples, together with others in the record, as well as the evidence of open hostility between Dr. Mahmoodian and the physicians and nurses in the obstetrical department, discussed above, support the conclusion that it is likely that patient care will be affected if appropriate correction action is not taken.

The witnesses also presented, and the Committee reviewed, evidence concerning past behavior on the part of Dr. Mahmoodian for the purpose of determining whether a pattern of disruptive behavior or unprofessional conduct existed which was unlikely to change through corrective action. Dr. Mahmoodian had been

reprimanded on one occasion, and his privileges curtailed on a second occasion by the Medical Executive Committee and the Board of Directors for conduct similar to the conduct currently under review. There is no reasonable likelihood that Dr. Mahmoodian will change his behavior and work to achieve the level of professional cooperation and collegiality necessary to assure quality patient care in the obstetrical department of the Hospital.

The adverse decision of the Executive Committee concerning the issue of the privileges of Saeed Mahmoodian, M.D. was supported by appropriate evidence. The rebuttal presented by Dr. Mahmoodian failed to show that the decision of the Executive Committee lacked any factual basis or that such decision was arbitrary, unreasonable or capricious. The Committee reviewed and considered the testimony of Dr. Mahmoodian

himself, and all documents submitted with his testimony including affidavits of patients regarding his care and treatment of them.

According to the bylaws of the Medical Staff, this Committee may recommend confirmation, modification or rejection of the original decision of the Executive Committee. Based on all the evidence adduced, and the submissions of counsel, the Committee unanimously recommends to the Executive Committee that its original decision on which these hearings were conducted concerning Saeed Mahmoodian, M.D., be confirmed in its entirety with a modification pertaining to Wertheim procedures, that the review by the Credentials Committee be concluded on or before January 1, 1989, but if such review is not completed by that time, then it is the recommendation of this Committee that

the portion of the original decision of the Executive Committee suspending Dr. Mahmoodian's privileges to perform Wertheim hysterectomies with pelvic lymphadenectomies be rejected, and his privileges in that area restored.

Respectfully submitted,

_____
William N. Walker, M.D.
Chairman

_____
Seetha Ginjupalli, M.D.

_____
Paul Brager, M.D.

Health Care Quality Improvement Act, Standards for Professional Review Actions

§11112 Standards for professional review actions

(a) In general -

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating-

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating--

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is required on a timely basis under paragraph (1)(B)--

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)-

(i) before an artbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right--

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof.

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of

law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved had the right-

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.